United States Court of Appeals

FOR THE NINTH CIRCUIT.

No. 16,139.

ROY VERNON SHAW,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

APPELLANT'S OPENING BRIEF.

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This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Northern Division. The appellant was sentenced to custody of the Attorney General for a period of 90 days (R. 8-9).* Title 18, Section 3231, United States Code, conferred jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of

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this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law (R. 9-10).

STATEMENT OF THE CASE.

The indictment charged appellant with violation of the Universal Military Training and Service Act (R. 3-4). It was alleged that he became a registrant of Local Board No. 79 of the Selective Service System in the County of Fresno, State of California, and that having theretofore been duly classified in Class I-O, did knowingly refuse and fail to comply with the order of his said Local Board No. 79 to report to said board for instructions concerning civilian work (R. 3-4).

Appellant pleaded not guilty, waived jury trial and was tried, convicted, and judgment was pronounced on May 28, 1958 (R. 8-9). A written motion for judgment of acquittal was filed (R. 5-7). The motion was denied and defendant sentenced, as aforesaid. The motion contains all of the grounds that the Appellant relies upon for reversal of the judgment in this case (R. 12-13).

THE FACTS.

Appellant was registered with the Selective Service System on September 18, 1951 (Exs. 1-2).**

**Ex. refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

He signed Series XIV of the Classification Questionnaire (Ex. 11), thereby asserting he was a conscientious objector. He made no entries whatsoever in Series VI, the portion of the questionnaire relating to ministry (Ex. 7).

On March 10, 1952, he was sent the Special Form for Conscientious Objectors which he completed and returned on March 17th (Exs. 14-17). His answers are noteworthy in the following details: he refused to sign either of the claims for exemption (Ex. 14) and he gave information that although his parents were both Jehovah's witnesses, he was not a member of any religious sect or organization (Ex. 16).

On April 21, 1952, the local board classified him in Class I-A-O (Conscientious Objector Available for Noncombatant Military Service Only).

On July 20, 1953, his local board received an executed College Student Certificate from his college Recorder (Ex. 19) and on October 5, 1953, he was reclassified in Class II-S (student) (Ex. 12). Thereafter, he remained in this class (except for an unexplained and immaterial three weeks' return to I-A, in November, 1953) until after his graduation in 1956.

On August 20, 1956, he was reclassified in Class I-A (Available for Military Service) and he timely appealed in writing (Ex. 76).

In a separate letter he specifically requested a personal appearance before the appeal board (Ex. 74).

On September 20, 1956, he was informed by the local board that the appeal board grants no personal appearance (Ex. 79).

On October 1, 1956, he was given a personal appearance before the local board and it reclassified him into Class I-O (Conscientious Objector Available for Civilian Work Contributing to the Maintenance of the National Health, Safety and Interest) (Ex. 13). On October 1, 1956, he gave information to the local board, in writing, that he had entered the ministry as one of Jehovah's witnesses; he executed a four page form on this subject that it furnished him (Exs. 80-83). He also gave oral answers to oral questions propounded, among other things, erroneously agreeing to such erroneously formulated questions as "You are not licensed to perform marriage or funeral services?" (Exs. 85-86).

On March 7, 1957, he presented wholly new evidence concerning his new status in the ministry, namely, showing that he had become one of the "servants". It was in writing (Ex. 100). His classification was not reopened.

The selective service file shows that the local board unsuccessfully tried to get the registrant to agree to do civilian work (Ex. 93).

On May 7, 1957, he was ordered to appear before the local board on May 23, 1957, "in accordance with provisions of section 1660.20 (c) of the regulations." This section provides for an "arbitrator" from state headquarters to attempt to reconcile the registrant to accepting I-O work (see 32 C.F.R., Sec. 1660.20).

On May 23, 1957, at this "arbitration" hearing he presented more written evidence of his new "servant" status (Exs. 105-109). He also gave oral answers to questions propounded at this hearing (Exs. 110-114). The file

is silent concerning any action taken or consideration given the evidence of his new status.

Thereafter he was ordered to report for instructions concerning civilian work and, upon his failure to do so, was indicted.

QUESTIONS PRESENTED AND HOW RAISED.

I.

Appellant presented written and oral evidence of his new status. No action whatever was taken by the local board.

The questions presented here are (1) was the evidence new? (2) was it such evidence which, if true, required reopening and/or reclassification? (3) Did the board comply with the law after receiving this evidence?

These "reopening" questions were raised by the motion (R. 12-13).

SPECIFICATION OF ERRORS.

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT.

The local board took no action whatsoever upon receipt of the March 7, 1957 (and subsequent), evidence of new status.

A. The regulations required that it at least send its registrant a letter (putting a copy in the file) informing him that it did not consider his new evidence sufficient to justify reclassification.

The cases cited show that this was procedural error sufficient to require acquittal.

B. The regulations required that there be a reopening of the classification when such evidence of new status was presented. A reopening, even if it resulted in the same (or a worse) classification would have given the registrant the opportunity for an administrative appellate determination.

The cases cited show that such a deprivation is procedural error requiring acquittal.

ARGUMENT.

I.

Appellant Presented New Evidence and of Such a Nature That His Classification Should Have Been Reopened.

This point involves the following: did the local board give any consideration to the evidence of new status submitted on and after March 7, 1957? Could the board fairly and legally ignore it?

Appellant will deal only incidentally with the prejudice to him caused by the local board's failure to give him its own determination of the legal effect of his new status evidence. Appellant will argue that his chief deprivation was due to the failure of the local board to follow the regulations and that it deprived him of an appellate determination of his new status.

The record is clear on the following:

1. In 1951, when appellant executed his Classification Questionnaire (Ex. 5-13) he was not a minister or a student for the ministry (Ex. 7).

2. In 1952, when appellant executed his Special Form for Conscientious Objectors (Ex. 14-17) he was not a member of any sect (Ex. 16) although both his parents were Jehovah's witnesses (Ex. 16).

3. On March 1, 1953, he was baptized as one of Jehovah's witnesses (Ex. 80).

At this time he was an agricultural college student and his position among the Jehovah's witnesses (who, as the Court knows, are all missionaries, some by vocation, some by avocation) was not such as to distinguish him from the rank and file.

4. On October 1, 1956, when he was before his local board his status as a missionary minister was unchanged and was summarized in the following dialog that took place on that occasion:

> "Q. Do you feel that you would qualify for deferment as a minister under the Selective Service law?"
> "A. Probably not as the law stands at present, on the basis of previous cases." (Ex. 85).

His obvious candor and his good judgment perhaps was what convinced the local board it should reclassify him into Class I-O, although no new evidence on conscientious objection was before it, other than his demeanor.

5. In the spring of the following year his status as a minister changed.

On March 7, 1957, he notified the local board that he now was one of the "servants", the Ministry School Servant. He also detailed some of his other responsible work in this letter (Ex. 100). *No action whatsoever* was taken by the local board with reference to the above new factual material other than the fact it was filed and now appears as page 100 of the Exhibit.

6. Soon thereafter, he supplied further new information of his new status: on pages 105 and 105A is found the affidavit of other leaders of his sect pointing out Shaw was "an appointed and ordained servant/minister". On page 106 is additional evidence that his potential was being recognized and that he had been given additional responsibilities of leadership in ministerial activity. On page 109 is corroborative evidence. *No action whatsoever* was taken by the local board other than to file these documents.

This failure to act was in direct disobedience of the Regulations. The regulations gave the board two options: (1) reopen and reclassify, even if into the same Class; (2) refuse to reopen and notify the registrant, placing a copy in the file. The local board did none of these things.

Section 1622.1 (c) requires "The local board will receive and consider all information, pertinent to the classi-

fication of a registrant, presented to it". The board obviously "received" the document of March 7, 1957 (and subsequent ones), but there is nothing in the file to show it took any action. We will concede that the board read the documents but this is not the type of consideration contempted by the regulations. The board must act, one way or another. There is no pocket veto in Selective Service. This point will be argued hereinafter.

The importance of consideration, generally, already has been given attention by this Court in at least two instances, *Talcott* v. *Reed,* (9 Cir.) 217 F. 2d 360, 364; *Knox* v. *United States,* (9 Cir.) 200 F. 2d 398, 402.

If the local board had given "reopening" consideration to this new evidence of new status, Shaw would have been able to take an administrative appeal if the local board action was adverse. The local board's inaction deprived him of this as well as depriving him of his right to a determination by the local board itself.

Section 1625.1 of the regulations provides, in part:

> "(a) No classification is permanent.
> "* * *
>
> "(c) The local board shall keep informed of the status of classified registrants".

Consequently, the prior classification was not permanent, and it was the duty of the local board to keep informed of the status of its registrant.

Section 1625.2 provides, in part:

> "The local board may reopen and consider anew the classification of a registrant (1) upon the written

request of the registrant, * * *, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classifications;" * * *.

Appellant wrote on March 7, 1957, and also during the subsequent months, showing the board new information never before known to the board, and showing his belief he should now be reclassified as a minister. He presented facts not in existence and therefore not considered at the time of his last classification (because he did not then claim he should have a minister's classification, and because they were not in existence) which facts, if true, would justify a change in a registrant's classification.

The regulations specifically provide for such situations. As above noted the regulations give the local board two choices: (1) to reopen; (2) to refuse to reopen.

We have already alluded to the deprivation suffered by Shaw due to the failure to reopen. We now point out two other considerations:

1. The local board did not follow its own regulations relating to refusal to reopen.

2. The facts presented were such that it was required of the board that it reopen.

A. The board violated its procedural regulations in the manner it handled the problem.

Section 1625.4 provides, in part:

"When a registrant, * * * files with the local board a written request to reopen and consider anew

the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified, or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification. *In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file.*" (emphasis supplied).

The information presented was evidence not present or in existence at any of the times the registrant was classified. However, if the new facts presented would not in the opinion of the local board justify a change in registrant's classification, "it shall not reopen the registrant's classification," but "shall advise (him) and shall place a copy of the letter in the registrant's file." This was not done.

There now appears in Appellant's selective service file considerable evidence in support of his claim that he is a minister. It is true that the local board could have found the new evidence would not justify a change in classification, and, consequently, it could have refused to reopen. However, if the local board determines that the new facts would not justify a change in classification and refuses to reopen, the regulations provide: "In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the re-

opening of the registrant's classification and shall place a copy of the letter in the registrant's file."

Appellant's board did nothing whatsoever. Appellant had no opportunity to either appeal to the appeal board or to appeal to the local board for a hearing devoted to considering the augmented file. In similar situations this has been held to be error meriting administrative reprocessing (by virtue of acquittal). In *United States* v. *Nichols*, No. 22,951, S. D. Calif., Judge Harry C. Westover held, on December 14, 1953:

> "On September 30, 1952, when the local board refused to reopen registrant's case, it mailed to him Form C-140. Even if Form C-140 should be considered a letter, no copy of said form appears in registrant's selective service file. As a consequence, there is no escape from the conclusion that the local board did not follow the regulations.
>
> "We are not now attempting to pass upon the validity of defendant's claim that he is entitled to a ministerial classification. He did, however make that claim to his local board. The local board by refusing to reopen the case took away from registrant the right to have the matter passed upon by the appeal board. We do not believe it was the intent of Congress to place with the local boards the arbitrary right to determine when a registrant should be entitled to an appeal. The local board might very well disagree with the registrant's contention, but local boards should be vigilant at all times to see that registrants have a right to test their opinions upon appeal. It seems to the court that the action of the local board in this case was arbitrary, as it took away from registrant the

right to present to the appeal board his claim that he was a minister.

"This court is of the opinion that Congress intended registrants should have a right to appeal classification to appeal boards, and that right of appeal should not be taken from them arbitrarily by local boards which refuse to reopen classification. Because of the arbitrary action of the local board in the case at bar, which deprived defendant of his right of appeal, it is necessary that this court find defendant not guilty as charged."

A similar problem arose in *LaCasse* v. *United States*, No. 23,222, S. D. Calif., on January 13, 1954. Just as Shaw made a request for an appearance before the Appeal Board (Ex. 74) which was refused, perhaps correctly (Ex. 79), so LaCasse made a futile attempt to appear before the local board. In his decision Judge Peirson Hall said:

"He made a request for a personal appearance, which I think was appropriately and properly under the regulations denied.

"The draft board, however, upon his request for a personal appearance did consider the additional affidavits and did what they called a review of his file, then and again subsequently, at which time the draft board had before them the three letters, or whatever it was which had been before the Department of Justice, and which they must have taken into consideration to arrive at their recommendation of I-A."

"The only means under the law by which this registrant could get before the Appeal Board the same thing that was before the Department of Justice and

the same thing that was before his local board after these letters were filed with the local board was by a reopening (emphasis supplied).

"He could not under the regulations appeal from merely a review, but had the draft board reopened his case and again classified him as I-A he then would have had the right of appeal so that the Appeal Board would have had an opportunity to have before them the same thing which was before the Department of Justice when they recommended that he be classified as a conscientious objector.

"I am satisfied that under the *Nichols* case that it was the duty of the draft board under that state of facts to have reopened the case so as to have permitted him—maybe they would have reached the same conclusion that the Department of Justice did, the Appeal Board to the contrary notwithstanding—but had they reached the same conclusion they previously did it would have afforded this registrant an opportunity to get before the Appeal Board the things which were not before them on the previous hearing.

"For that reason I think that the action of the local board was arbitrary and that there has been no commission of an offense and the defendant is acquitted. His bond is exonerated, and the defendant is discharged."

In reaching a similar conclusion on this "reopening" question the Fifth Circuit, in *Olvera* v. *United States,* 223 F. 2d 880, remarked:

"Under this principle, it is of the essence of the validity of board orders and of the crime of disobeying them that all procedural requirements be strictly and

faithfully followed, and that a showing of failure to follow them with such strictness and fidelity will invalidate the order of the board and a conviction based thereon." (382).

The Fifth Circuit used the reasoning of Judge Westover:

> "In the Witmer case, the action of the local board was reviewed by the appeal board to which the file was sent. Here the failure to rule formally on the request to reopen and reclassify denied Olvera of his right to an appeal from this adverse action. In fact Olvera was not even notified of his retention in Class I-A except that the local board 'processed him for induction.' " (883).

Still other courts have held that such evidence entitles a registrant to an administrative appellate opportunity. Chief Judge Roche, in *United States* v. *Nimori*, N. D. Calif., September 25, 1953, No. 33680, held:

> "Thereupon, after due consideration the Court finds that the defendant was classified I-A in December of 1948; that thereafter defendant presented facts and information not considered when defendant was originally classified and which, if true, would justify a change in defendant's classification; that the local board's refusal to reopen said classification and grant defendant the right to a personal appearance or appeal was an abuse of discretion and was in violation of Section 1625.2 and Section 1625.4 of the Selective Service Act and Regulations, and the procedural rights of defendant guaranteed under the Selection Service Act and Regulations have been denied him, and therefore the defendant is not guilty as charged."

Also see *Ransom* v. *United States,* (7 Cir.) 223 F. 2d 15, 17; *United States* v. *Vincelli,* (2 Cir.) 216 F. 2d 681, 682.

In the most recent Circuit decision on "reopening", *Stepler* v. *United States,* (3 Cir.) No. 12498, July 23, 1958, the opinion notes that when the local board refused to reopen "defendant was advised by the local board that the evidence did not warrant reopening his classification." In the case at bar the local board not only arbitrarily refused to reopen (as we will next argue) but even failed to comply with the regulation requiring notification.

It must always be kept in mind that one can even agree with the implication of the local board's inaction, namely, that the new evidence would not "justify" a reclassification into the Class sought by the registrant, and still condemn the local board's inaction that not only deprived the appellant of the opportunity to have the administrative appeal board pass on his new evidence but even of a notification of the board's refusal to act.

The Third Circuit summed up this subject in *Stepler, supra.*

> "Furthermore we are here not concerned with whether the defendant made out a case which meets the statutory criteria. We are concerned only with the question whether the local board complied with the law and the regulations and we conclude that it did not comply with the regulations but denied the defendant a procedural right which vitiated the entire proceeding."

B. The local board was required to reopen.

We have already argued that appellant was deprived of a "strict and faithful" following of the procedural regulations.

We now argue that the new evidence was sufficient in amount and quality to require reopening.

The Dickinson decision is of importance in this connection. In *Dickinson* v. *United States,* 74 S. Ct. 152, it is made clear that the local board must proceed on evidence, not on suspicion or speculation. Appellant presented evidence never known to, or before the local board at any time.

Upon receipt of the aforesaid evidence the problems before the local board were as follows:

1. Is it true?
2. If true, does it require reclassification action?

It is reasonable to conclude that the appellant actually had become one of the servants who conduct the services (Ex. 113 shows he was one of the servants who conducted the services at three separate places). His education and the fact no evidence appears either to contradict or to even question his claim supports this view.

Conceding its truth, as we believe appellee will, did it require reclassification action? Yes, by all fair standards. The act and the regulations require only that the minister be "a regular minister of religion" (Section 1622.43 (a) (1)) or "a duly ordained minister of religion" (Section 1622.43 (a) (2)). The difficulty of the draft boards arises

in the interpretation, and the regulation, in its effort to clarify the problem goes on to say:

> "The term 'regular or duly ordained minister of religion' does not include a person who irregularly or incidentally preaches and teaches the principles of religion of a church, religious sect, or organization and does not include any person who may have been duly ordained a minister in accordance with the ceremonial, rite, or discipline of a church, religious sect or organization, but who does not regularly, as a vocation, teach and preach the principles of religion and administer the ordinances of public worship as embodied in the creed or principles of his church, sect, or organization." (Subsection (3) of (b)).

It is evident that this definition, with respect to vocation, still is a matter on which minds can well disagree. The usual question is how many hours of secular work disqualify a registrant from being considered a minister by vocation? The Courts do not agree,* and absent legis-

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*Some use the hours per week standard. For example, in *United States* v. *Stankewicz,* 20 hours per week of secular work was not disqualifying; 124 F. Supp. 27, 28.

In the more recent case of *United States* v. *Cheeks,* 159 F. Supp. 328, the decision notes, concerning the local board, "When they found he was continuing his 40 hours a week secular employment they * * * denied him a ministerial classification" (329). Although the acquittal was based on the fact a board member didn't think any of Jehovah's witnesses is entitled to a minister's classification, it is clear the trial judge didn't believe a regular secular job was disqualifying.

Some go by "regularity" as in *United States* v. *Thomas,* D. N. J. Apr., 1955, No. 229-54, where Judge Forman noted: "Beyond his taking on the secular work necessary to furnish a basis for livelihood for his wife and himself, where is there any evidence that the

lation (assuming its validity) it is unlikely there ever can be agreement on this subject. Thus, it must be concluded that any reasonable showing of new status in the ministry, whether it be a substantially larger proportion of religious to secular hours or, as here, of substantially higher position in the hierarchy, should entitle the registrant to be considered a candidate for reclassification. Many a federal judge has said "If I were classifying him on this record I might have classified him differently, but the law doesn't give me * * * etc." By the same token, when a reasonable quantity and quality of new evidence is presented it is only fair that the board say: "Well, we don't think he should be classified as a minister but the Appeal Board may think otherwise, so we'll give him his chance for an appellate determination". This is analogous to a district judge admitting an appellant to bail pending appeal. When a local board deprives a registrant of the opportunity to have his new evidence weighed by an administrative appeal board it is an arrogation of infallibility to itself. This Court should condemn such immodesty.

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regularity of his ministerial duties changed or was affected thereby".

This Court seems inclined to use the rule of necessity. In *Brown* v. *United States,* 216 F. 2d 258, the opinion notes that Brown, when informing the local board he had become one of the servants added that he was working for short periods of time in order to provide himself with subsistence and to defray his expenses (259).

CONCLUSION.

Appellant at least should have had the opportunity for an administrative appeal so that his new status could have been reviewed.

The judgment of conviction should be reversed so that he can be reprocessed by the Selective Service System on his new status.

Respectfully submitted,

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